STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED June 27, 2006
v	No. 261039 Wayne Circuit Court
MICHAEL EUGENE WYNN, Defendant-Appellant.	LC No. 04-0009111-01

Before: Bandstra, P.J., and Saad and Owens, JJ.

PER CURIAM.

Defendant appeals as of right his jury trial convictions for second-degree murder, MCL 750.317, and possession of a firearm during the commission of a felony, MCL 750.227b. Defendant was sentenced to 22½ years to 33½ years' imprisonment for the second-degree murder conviction and two years' imprisonment for the felony-firearm conviction. We affirm.

Defendant first argues there was insufficient evidence to convict him of second-degree murder. We disagree.

In reviewing the sufficiency of the evidence, this Court must view the evidence de novo, in the light most favorable to the prosecutor, and determine whether a rational trier of fact could find that the essential elements of the crime were proven beyond a reasonable doubt. *People v Tombs*, 472 Mich 446, 459; 697 NW2d 494 (2005). Questions of credibility should be left to the trier of fact to resolve. *People v Avant*, 235 Mich App 499, 506; 597 NW2d 864 (1999). The elements of second-degree murder are: (1) a death, (2) caused by the defendant, (3) with malice, and (4) with no justification or excuse. *People v Werner*, 254 Mich App 528, 531; 659 NW2d 688 (2002). Malice is either the intent to kill, the intent to cause great bodily harm, or the intent to act in wanton and willful disregard of the likelihood that the natural tendency of the act is to cause death or great bodily harm. *People v Goecke*, 457 Mich 442, 464; 579 NW2d 868 (1998). The prosecution is not required to prove that the defendant actually intended to harm or kill; instead, it must prove the intent to act in obvious disregard of life-endangering consequences. *People v Mayhew*, 236 Mich App 112, 125; 600 NW2d 370 (1999).

Defendant admitted shooting the victim but disputed whether he shot the victim with malice and without justification or excuse. He did not check to see if the gun was loaded or if the safety was on even though the gun had been out of his sight for some time. A fundamental rule of gun safety requires that all guns be treated as loaded. *Tillman v Florida*, 842 So 2d 922,

927 (Fla App, 2003); *United States v Davis*, 47 MJ 484, 489 (CAAF, 1998); *United States v Burger*, 419 F2d 1293, 1294 (CA 5, 1969). The victim's daughters heard the victim tell defendant to stop playing with the gun. The gun could only be fired by pulling the trigger, and the muzzle of the gun was touching the victim's head when the gun was fired. Hence, the prosecutor presented sufficient evidence that defendant acted in obvious disregard of life-endangering consequences. Defendant offered several versions of what happened, none of which accounted for the contact wound to the victim's head. Viewing the evidence in a light most favorable to the prosecution, and leaving questions of credibility to the jury, we conclude that sufficient evidence was presented for a rational trier of fact to convict defendant of second-degree murder.

Defendant next argues the trial court erred in failing to instruct the jury on his accident defense. A party must challenge an instruction at trial to preserve the issue for appeal. *People v Carter*, 462 Mich 206, 214; 612 NW2d 144 (2000). A party waives review of the propriety of jury instructions when he approves the instructions at trial. *People v Lueth*, 253 Mich App 670, 688; 660 NW2d 322 (2002). Waiver constitutes the intentional abandonment of a known right, and a party who waives a known right cannot seek appellate review of the claimed error. *Carter, supra* at 215. Defense counsel stated that defendant was satisfied with the instructions as given by the trial court. By expressly approving the instructions as given, defendant waived this issue.

Defendant next argues he was denied effective assistance of counsel by defense counsel's failure to request an instruction on the accident defense. We disagree.

Because defendant failed to move for a new trial or an evidentiary hearing on this basis at trial, appellate review is foreclosed unless the record contains sufficient detail to support his claims; if so, our review is limited to the record. *People v Barclay*, 208 Mich App 670, 672; 528 NW2d 842 (1995). To prevail on a claim of ineffective assistance of counsel, a defendant must make two showings. First, the defendant must show that counsel's performance was deficient to the extent that the defendant was denied the Sixth Amendment right to counsel. *People v Carbin*, 463 Mich 590, 599-600; 623 NW2d 884 (2001). Second, the defendant must show that he was prejudiced by the deficient performance. *Id.* Prejudice is shown if there is a reasonable probability that the result of the proceeding would have been different absent counsel's error. *Id.* at 600.

Assuming for the sake of argument that defense counsel was deficient, defendant cannot show that the deficient performance prejudiced him. "'[A]ccident' is subsumed within the charge of involuntary manslaughter because the jury must consider whether the defendant's conduct was negligent, careless, reckless, willful and wanton, or grossly negligent." *People v Hess*, 214 Mich App 33, 39; 543 NW2d 332 (1995). Here, the judge instructed the jury on the lesser included offenses of involuntary manslaughter, MCL 750.329; and careless, reckless, or negligent use of a firearm with injury or death resulting, MCL 752.861. Hence, the jury was presented with offenses containing less culpable states of mind. The jury convicted defendant of second-degree murder and, therefore, found beyond a reasonable doubt that defendant shot the victim with malice and without justification or excuse. We thus conclude there is no reasonable probability that the result of the proceeding would have been different absent the claimed error, and defendant was not denied his right to effective assistance of counsel. *Carbin, supra.*

Defendant next argues the trial court erred by scoring offense variable (OV) 5 at fifteen points. We disagree.

A sentencing court's scoring decision is reviewed for an abuse of discretion. *People v McLaughlin*, 258 Mich App 635, 671; 672 NW2d 860 (2003). The court has discretion to determine the number of points to be scored if the evidence of record adequately supports the score. *People v Hornsby*, 251 Mich App 462, 468; 650 NW2d 700 (2002). An abuse of discretion has occurred when an unprejudiced person, considering the facts before the trial court, would conclude that there was no justification for the ruling. *People v Murray*, 234 Mich App 46, 52; 593 NW2d 690 (1999). OV 5 addresses the psychological injury to a member of the victim's family. MCL 777.35. The trial court must assess fifteen points for OV 5 if "[s]erious psychological injury requiring professional treatment occurred to a victim's family . . . ." MCL 777.35(1)(a). The failure to seek treatment is not conclusive whether serious psychological injury occurred. MCL 777.35(2).

Here, two of the victim's daughters testified that when they responded to the shot, they saw their mother slumped over bleeding. The medical examiner testified that part of the victim's head was gone, and her brain was eviscerated from the spinal cord. Her brain was actually brought to the medical examiner's office separate from the body. The prosecution noted at sentencing that the picture admitted in evidence depicted blood spattered against the windows and blinds. Certainly the circumstances were sufficient to create psychological injury. The prosecutor also noted the victim's four children had been enrolled in an eight-week counseling program. The evidence in the record adequately supported a score of fifteen points for OV 5, and the trial court did not abuse its discretion in scoring the guidelines.

Defendant next argues the trial court abused its discretion in departing from the sentencing guidelines. Under the legislative guidelines, a trial court must choose a minimum sentence within the guidelines range unless there is a "substantial and compelling" reason for departure. *People v Babcock*, 469 Mich 247, 255-256; 666 NW2d 231 (2003). As acknowledged by defendant, the guidelines prescribed a minimum sentence range of 162 to 270 months. The trial court stated there was no departure from the guidelines and sentenced defendant to a minimum of 270 months. Because the trial court did not depart from the guidelines, defendant's argument has no merit.

Defendant next argues that pursuant to *Blakely v Washington*, 542 US 296; 124 S Ct 2531; 159 L Ed 2d 403 (2004), the trial court improperly considered evidence that was not presented to the jury when the court sentenced him. Our Supreme Court has held that Michigan's sentencing system remains unaffected by the holding of *Blakely* because Michigan has an indeterminate sentencing scheme in which the defendant is given a sentence with a court-determined minimum and a statutory maximum. *People v Claypool*, 470 Mich 715, 730 n 14; 684 NW2d 278 (2004). This Court is bound by the statement of our Supreme Court that *Blakely* does not affect Michigan's sentencing system. *People v Drohan*, 264 Mich App 77, 89 n 4; 689 NW2d 750 (2004), lv pending 472 Mich 881 (2005). We therefore conclude that the trial court did not rely on improper evidence in contradiction of *Blakely*.

Affirmed.

/s/ Richard A. Bandstra
/s/ Henry William Saad
/s/ Donald S. Owens